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In The

UNITED STATES SUPREME COURT

October Term, 1954

No. ————

THE DIXIE TERMINAL COMPANY,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the Sixth Circuit entered in the above entitled case on October 21, 1954.

OPINIONS BELOW

The opinion of the Court below denying the *"Petition of Respondent for Order Vacating Judgment and Denying Enforcement"* of an order of the National Labor Relations Board, as amended, is reported in 26 L. C. § 68,786; —— F. (2d) —— (R. III-21a).* The order of the National Labor Relations Board denying petitioners *"Motion of*

* Reference to the Transcript of Record, which is in three volumes, consisting of the appendix of the Board filed in Case No. 770 (October Term, 1953), the appendix of the Company filed in Case No. 770 (October Term, 1953), and the Supplementary Transcript of Record in the Sixth Circuit filed herein, will be identified by the symbols R. I, R. II, and R. III respectively.

Employer to Withdraw and Rescind Decision and Order" is unreported and is printed in Appendix B, *infra,* p. 21. The previous opinion of the Court of Appeals decreeing enforcement of the order of the National Labor Relations Board, as amended, is reported at 210 F. (2d) 538. (R. II-142a-146a; R. III-2a-5a). The findings of fact, conclusions of law and order of the National Labor Relations Board, including the Intermediate Report of the Trial Examiner, are reported at 102 NLRB 1452. (R. I-8a-75a).

JURISDICTION

The order of the Court of Appeals denying the said *"Petition of Respondent for Order Vacating Judgment and Denying Enforcement"* was entered on October 21, 1954. The petitioner invokes the jurisdiction of this Court under the provisions of 28 USC Sec. 1254 (1) and 29 USC Sec. 160 (e).

QUESTION PRESENTED

Should a cease and desist order issued by the National Labor Relations Board against the petitioner continue to be enforced after the National Labor Relations Board, while the case was still pending, changed its jurisdictional standards in such a way as to exclude jurisdiction over the petitioner.

STATUTES INVOLVED

The pertinent statutory and regulatory provisions are printed in Appendix A, *infra,* pp. 16-20.

STATEMENT OF THE CASE

On January 16, 1952, a charge was filed with the National Labor Relations Board by Building Service Em-

ployees International Union, Local No. 153-A, Building Service Employees International Union, AFL, against The Dixie Terminal Company, petitioner. (R. I-3a). A complaint was subsequently issued. (R. I-4a). After hearings, the National Labor Relations Board's Trial Examiner, on October 27, 1952, issued his Intermediate Report, finding that petitioner was engaged in commerce within the meaning of Section 2 (6) and (7) of the Act, and had engaged in certain unfair labor practices affecting commerce within the meaning of the said sections. On February 18, 1953, the National Labor Relations Board issued its decision and order over the objection of the petitioner, affirming and adopting the findings, conclusions and recommendations of the Trial Examiner. (R. I-8a). Subsequently, the Board petitioned the Court of Appeals for the Sixth Circuit for enforcement of its order, pursuant to 29 USC Sec. 160 (e).

The Court below refused to enforce the order as originally issued, but amended the Board's order and decreed enforcement thereof as amended. (R. II-142a-146a R. III-2a-6a). With respect to the jurisdictional question raised by the petitioner in the proceedings, the Court of Appeals specifically found that the work of petitioner's elevator and service employees, although local in nature, had such a relationship to the business of tenants of the petitioner who were engaged in interstate commerce as to affect commerce within the meaning of the Act, and that the petitioner, therefore, was subject to the Act and to the orders of the National Labor Relations Board. (R. II-142a-146a R. III-2a-6a).

On May 19, 1954, the petitioner filed a writ of certiorari with this Court. The sole ground advanced for the writ was the petitioner's contention that the Board lacked jurisdiction over the petitioner's general office building because such building was essentially "local business." On June 7, 1954, this Court denied certiorari. (347 U.S. 1015).

On July 1, 1954, subsequent to the said denial of certiorari, but at a time when the instant case was still pending before the National Labor Relations Board in compliance proceedings pursuant to the provisions of the said order of the Court of Appeals, dated February 26, 1954, the Board publicly announced a new jurisdictional policy, under the provisions of which the Board would not have assumed jurisdiction over the petitioner. (34 LRR 223). In this new jurisdictional statement and policy, the Board specified, in paragraph (e) thereof that:

> *"Jurisdiction will not be exercised over general or public office buildings merely because they have tenants over which the board exercises jurisdiction."*

The Board further specified in this jurisdictional announcement that:

> "These changes in its jurisdictional standards will take effect immediately. *The new standards will be applied to pending cases as well as those filed hereafter."* (Emphasis added).

The full text of the Board's jurisdictional policy as announced on July 1, 1954 and still in effect is set forth in Appendix A at page 18, and in the *Swigert affidavit* presented to the Sixth Circuit. (R. III-12a).

On or about July 9, 1954, the petitioner filed a *"Motion of Employer to Withdraw and Rescind Decision and Order"* with the National Labor Relations Board in Case No. 9-CA-497. (R. III-17a). This motion was based on the Board's said change in jurisdictional policy. On or about August 14, 1954, the Board entered an order denying the above motion without opinion or a statement of any reason. (Appendix B, *infra*, p. 21).

On or about September 24, 1954, the petitioner filed a *"Petition for Order Vacating Judgment and Denying En-*

forcement" with the Court below. (R. III-6a). This petition was likewise based on the Board's previously announced change in jurisdictional policy and was filed during the term of Court in which the said judgment of February 26, 1954 had been entered. On October 21, 1954, the Court of Appeals entered an order denying the said petition of the petitioner. The Court's opinion is reported at 26 LC § 68,786.

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals erred in failing to vacate its judgment of February 26, 1954 and in failing to deny enforcement to the Board's said decision and order against the petitioner of February 18, 1953 after the Board's said change of jurisdictional policy announced on July 1, 1954, and the Board's denial of the petitioner's *"Motion of Employer to Withdraw and Rescind Decision and Order"* had been duly brought to the attention of the Court below by the petitioner during the term of the Court in which judgment had been entered and while the case against the petitioner was still pending before the Board in enforcement proceedings being conducted by the Board pursuant to the said judgment of the Court below.

REASON FOR GRANTING THE WRIT

1. The decision of the Court below is in conflict with the decision of the Court of Appeals for the Eighth Circuit in NLRB v. National Gas Co., 215 F. (2d) 160, decided on August 10, 1954.

The Board's jurisdictional announcement of July 1, 1954 not only relinquished jurisdiction over general office buildings, but also relinquished jurisdiction over certain other categories of local business. In the *National Gas*

Company case, *supra,* the Board had ordered a small gas appliance dealer to reinstate a discharged employee with back pay, and to cease and desist from certain unfair labor practices, and had petitioned the Court of Appeals for the Eighth Circuit for enforcement at a time when the retailer was subject to the jurisdiction of the Board under the Board's then prevailing policy. Under the change in jurisdictional policy announced by the Board on July 1, 1954, the Board no longer would have exercised jurisdiction over the small gas appliance dealer. The announcement occurred while the Board's petition for enforcement of its decision and order was pending in the Court of Appeals for the Eighth Circuit. Upon application of the appliance dealer, the Court of Appeals for the Eighth Circuit refused to enforce the Board's order against the appliance dealer, even though the Board continued to seek enforcement thereof. In its opinion, the Court of Appeals stated, in part:

> "Since our duty is to apply the law in its present form, and not as it existed at the time of the decision and order below (citing cases), we must decline to grant the petition for enforcement.
>
> "The Board, it seems to us, is in the untenable position of asking this court to proceed in a case in which it has precluded itself from proceeding, both by express decision and by the adoption and promulgation of self-limiting rules. An order of enforcement, if granted by this court, would require further action on the part of the Board and respondent employer. ***But the Board, under its decision that its new regulations shall apply to pending as well as future cases, has specifically denied its jurisdiction over respondent and other employers similarly situated. It could not consistently with the rules it has adopted and published exert its powers to effectuate an enforcement order of this court against the respondent. Such an order and any action***

of the Board in respect to it would present an arbitrary and capricious discrimination against respondent." (215 F. (2d) at page 163). (Emphasis added).

The only relevant distinction between the *National Gas* case and the instant case is that in the *National Gas* case, the change in the Board's jurisdictional policy occurred while the original petition for enforcement was pending before the Court of Appeals, whereas in the instant case, the change of policy occurred very shortly after this Court had denied certiorari and the cause had been remanded to the Board "to analyze the amounts of back pay" (R. I-19a) and to determine the possibility of reinstatement pursuant to the judgment of the Court of Appeals for the Sixth Circuit, entered on February 26, 1954. It is respectfully submitted that this factual distinction has no legal significance and that the decisions of the two Courts of Appeals on this important subject are substantially in conflict. This conflict should be resolved by this Court.

It is clear from the record that the National Labor Relations Board exercised jurisdiction over the petitioner's office building in the instant case solely because the petitioner leased space to tenants who were in interstate commerce and who were, therefore, subject to the jurisdiction of the Board. (R. I-8a; 102 NLRB 1452). The record shows without dispute that the sole activity of the petitioner is the ownership, maintenance and management of a multi-storied office building in downtown Cincinnati. The petitioner exercises no control over and takes no part in its tenants' operations. The petitioner sells no goods in commerce and makes no substantial purchases therein. The Board has never claimed that sales or purchases bring the petitioner within the jurisdiction of the Board. The petitioner's only contact with interstate commerce is through its tenants who rent space in the Dixie Terminal

Building and who are engaged in commerce which subjects such tenants to the jurisdiction of the Board. No manufacturing or production activities of any kind take place on the petitioner's premises.

The Dixie Terminal Building gets its name from the fact that a relatively small amount of space in the building is leased by the petitioner to the Green Lines Company and is used by the latter company as office space and as an interstate bus terminal. The petitioner itself is not engaged in any way in the transportation or communications industry or in any business other than the real estate business. These facts are undisputed in the record.

The Board asserted jurisdiction over the respondent solely because it found respondent to be an enterprise "furnishing goods or services of $50,000 a year or more to concerns which were instrumentalities and channels of commerce, interstate or foreign", or to concerns which were "public utility and transit systems" or "enterprises producing or handling goods destined for out of state shipment or performing services outside the state in which the firm is located, valued at $25,000 a year." (R. I-29a; *Hollow Tree Lumber Co.* [1950] 91 NLRB 635, 636). From the foregoing, it will be observed that jurisdiction was entertained over the respondent solely because the respondent had tenants over which the Board exercised jurisdiction.

In paragraph (e) of its new jurisdictional policy announced July 1, 1954, the Board specified that:

> "Jurisdiction will not be exercised over general or public office buildings merely because they have tenants over which the Board exercises jurisdiction."

It is clear, therefore, that the Board would not have entertained jurisdiction over the petitioner if the said jurisdictional policy had been adopted and announced by the

Board before the Board rendered its decision and order against the petitioner on February 18, 1953.

The Board's jurisdictional policy announcement of July 1, 1954 proclaimed that:

> "These changes in its jurisdictional standards will take effect immediately. The new standard will be applied to pending cases as well as those filed hereafter."

The instant case was clearly a "pending case" on July 1, 1954. In *NLRB* v. *Byrd Machine Co.* (CA 1; 1949) 174 F. (2d) 404, it was held that an NLRB proceeding remains pending after the entry by the Court of Appeals of an enforcement order and until the exact amount of back pay has been subsequently concluded and compliance proceedings have been completed by the Board. The Court of Appeals for the First Circuit expressed agreement with the statement of the Court of Appeals for the Fourth Circuit in *Wallace Corporation* v. *NLRB* (CA 4; 1947) 159 F. (2d) 952, at page 954, that:

> "The order of the Board which we have heretofore ordered enforced does not specifically provide what amounts are to be paid to the employees named or what positions are to be tendered to them, but covers these matters in general terms. *General orders of this sort entered by the Board with respect to back pay and reinstatement manifestly contemplate further admintrative action on its part, i. e. determination of the exact amount of back pay to be tendered and determination as to what positions are available and substantially equivalent for the purposes of the reinstatement ordered. Such general orders are analogous to interlocutory judgments of courts fixing liability but leaving for future determination questions as to amount of liability; and our decrees affirming or enforcing them are analogous to our affirmance of interlocutory judgments on appeal.* After the general order of the

> Board for back pay and reinstatement is affirmed or ordered enforced by us, *the Board must work out the details of reinstatement and of the amounts to be paid as back pay under the general provisions of the order.* This can ordinarily be done by negotiation; but, if controversy arises, the facts must be found by the Board, the body to which Congress has committed the administrative process." (Emphasis added.)

As pointed out in the *Swigert affidavit* (R. III-12a), the petitioner and the Board were in the process of working out the details of reinstatement and the amounts to be paid as back pay under the general provisions of the order, when the Board on July 1, 1954 announced its change in jurisdictional policy.

Under the circumstances set forth above, it is respectfully submitted that to enforce the Board's order against this petitioner after the Board has renounced jurisdiction over employers such as the petitioner is just as much "an arbitrary and capricious discrimination" against the petitioner as enforcement of the Board's order in the *National Gas* case would have been. If injustice is to be avoided, this conflict should be resolved by this Court.

2. The question is an important one which has not been and should be settled by this Court.

Title 29 USC Sec. 160(a) empowers the National Labor Relations Board to prevent any person from engaging in an unfair labor practice "affecting commerce." *Title 29 USC Sec. 152(7)* defines the term "affecting commerce" as meaning:

> "* * * in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce."

Title 29 USC Sec. 152(6) defines the term "commerce" as meaning, in substance:

> "* * * trade, traffic, commerce, transportation, or communication among the several States, * * *"

In 1950 the Board established certain jurisdictional standards which were to be applied by the Board in determining whether or not to exercise jurisdiction over particular employers. *Hollow Tree Lumber Co.* (1950) 91 NLRB 635, *supra; Stanislaus Implement and Hardware Co., Ltd.* (1950) 91 NLRB 618; *Federal Dairy Co., Inc.* (1950) 91 NLRB 638; *Dorn's House of Miracles* (1950) 91 NLRB 632; *Rutledge Paper Products, Inc.* (1950) 91 NLRB 625; *W. C. King, dba Local Transit Lines* (1950) 91 NLRB 623; *WBSR Inc.* (1950) 91 NLRB 630; *Borden Co. (Southern Division)* (1950) 91 NLRB 628; *Westport Moving and Storage Co.* (1950) 91 NLRB 902; *16th Annual Report, National Labor Relations Board,* page 16.

Before the adoption of the above jurisdictional standards, the Board declined to exercise jurisdiction over general office buildings such as that owned and operated by the petitioner. *Midland Building Co.* (1948) 78 NLRB 1243; *Central Tower Inc.* (1949) 84 NLRB 357; *Corrigan Properties, Inc.* (1949) 87 NLRB 252. After the adoption of the above jurisdictional standards, the Board overruled the above cases and announced that it would exercise jurisdiction over general office buildings. *Cormqx, Inc.* (1951) 94 NLRB 1150; *Charlotte Barth Howell and Van Schaack & Co.* (1951) 95 NLRB 1028. On the apparent basis of these latter authorities, the Board decided to exercise jurisdiction over the petitioner for the sole reason that the petitioner rented space in its building to tenants over which the Board exercised jurisdiction. (R. I-14a, 32a-33a).

While the case was pending before the Board, the Board changed its jurisdictional standards through a public announcement on July 1, 1954, as stated above. The announcement clearly specified that the change in standards *"will take effect immediately"* and that *"the new standards will be applied to pending cases as well as those filed hereafter."* (Emphasis added). Despite this fact, the Board refused to set aside its order against the petitioner in response to the petitioner's *"Motion of Employer to Withdraw and Rescind Decision and Order"* filed with the Board on July 9, 1954, and the Court of Appeals for the Sixth Circuit, on October 21, 1954, declined to vacate the enforcement order previously entered by it, and denied the petitioner's duly filed *"Petition of Respondent for Order Vacating Order and Denying Enforcement."*

As a result of these events, the petitioner is clearly the victim of an arbitrary and capricious discrimination. The Board cannot, consistently with the rules it has adopted and published, exert its power to effectuate an enforcement of the order of the Court below against this petitioner. It is respectfully submitted, therefore, that the Court below should have vacated the judgment against the petitioner of February 26, 1954. This is particularly true in view of the fact that an NLRB enforcement order "is, in effect, a continuing injunction." *McQuay-Norris Mfg. Co.* v. *NLRB* (CCA 7; 1941) 119 F. (2d) 1009; cert. den. 313 U.S. 564; 85 L.E. 1524.

Section (6) of the Labor Management Relations Act, 1947 (Title 29 USC Sec. 156) states that:

> "The Board shall have authority from time to time to make, amend, and rescind, in the manner prescribed by Sections 1001-1011 of Title 5 [Administrative Procedure Act], such rules and regulations as may be necessary to carry out the provisions of this Act."

The jurisdictional standards announced by the Board on July 1, 1954 were presumably prolmulgated pursuant to the authority of this section of the Act.

Section 10 (e) of the *Administrative Procedure Act* (5 USC Sec. 1009) provides that the reviewing court shall hold unlawful and set aside agency action, findings and conclusions found to be " (1) *arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law.*" In *Willapoint Oysters* v. *Ewing* (CA 9; 1949) 174 F. (2d) 676; cert. den. 338 U.S. 860, petitioner petitioned the Ninth Circuit to review an order of the Food and Drug Administrator, which order provided in part that western canners must label their product "Pacific Oysters", whereas eastern and southern canners could label their product either "Cove Oysters" or "Oysters." Petitioner claimed that such an order was unreasonable and not in accord with law under the provisions of Section 341 of the Food and Drug Act, and arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law under the provisions of the Administrative Procedure Act, Section 10 (e), since it gave exclusive use of the generic term "oysters" to the eastern and southern packers when that term applied equally to the western canners' product. The court set aside the order, and said:

> "It (the order) purports to regulate the entire oyster industry, thus on review it must be examined in the light of, and viewed against, the background of the entire industry. Even though a portion of an order, lifted from context, may be supported, we think that it may be extremely arbitrary, capricious and unreasonable when examined in the light and against the background of the order's entire effect. Such is the situation we find here.
>
> "Permitting one segment of a sea food industry to enjoy the exclusive use of a term naturally associated

> with and normally applied to an article of food in common use under a common name without the most cogent reasons directly pertinent to the protection of the consuming public, appeals to us as being outside the bounds of reason and fairness. A purchaser who inspects the two products side by side, one labeled "Oysters," the other "Pacific Oysters", would probably be left with the impression that the latter are in some form atypical, possibly not a true member of the oyster family. We think that the danger inherent in such a situation makes it manifestly unfair to that portion of the industry discriminated against, and to that extent we regard the requirement as arbitrary, capricious and an abuse of discretion. The requirement as to "Standard of Identity" is therefore set aside."

The National Labor Relations Board has relinquished jurisdiction over all general office buildings, including those against which cases are pending. However, the Board has arbitrarily and capriciously singled out the petitioner and sought continued enforcement of its order, even though petitioner operates a general office building and the case is still pending before the Board. As pointed out in the *Willapoint Oysters* case, the court's duty under the Administrative Procedure Act is to examine an administrative order in the light and against the background of the order's entire effect. If such an examination reveals that one segment of an industry is discriminated against, then the order must be set aside as arbitrary, capricious and an abuse of discretion. The Board's order, as enforced by the Court below, requires petitioner to comply with certain provisions of the Labor Management Relations Act, 1947.

In previous hearings, counsel for the petitioner has pointed out that no other case in the country has been found in which the National Labor Relations Board has entered and obtained enforcement of a cease and desist order against the owner or operator of a general office

building. The Board has not contested the truth of this statement. Since jurisdiction over general office buildings in all other pending and future cases has been relinquished and since the Board has indicated that it will not seek enforcement of any past unenforced cease and desist orders, the petitioner has become and will remain the only general office building in America subject to the restraints of the Labor Management Relations Act unless the pending judgment against the petitioner is reversed and vacated. Such a situation surely is not "equal justice under law."

The net effect of this discrimination is to leave the Dixie Terminal Building in Cincinnati a tiny island in the office building industry subject to all the provisions of the Act, while no other office building in the country is subject to any of the provision of the Act. This is manifestly unfair, discriminatory, arbitrary, capricious and an abuse of discretion in violation of the provisions of both the Labor Management Relations Act, 1947, and the Administrative Procedure Act.

CONCLUSION

This petition presents a serious question in the administration of the Labor Management Relations Act. There is a clear conflict of opinion and decision between the Court of Appeals for the Eighth Circuit and the Court of Appeals for the Sixth Circuit. This Court should act also to protect the petitioner from arbitrary and discriminatory application of rules and regulations promulgated by the National Labor Relations Board, in violation of the Labor Management Relations Act, 1947, and the Administrative Procedure Act.

Respectfully submitted,

JOHN B. HOLLISTER,
Attorney for Petitioner.

APPENDIX A

STATUTES AND REGULATIONS

5 USC Section 1009

Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion.

* * *

(e)

So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of Sections 1006 and 1007 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record of such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

29 USC Section 152(6).

The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory,

or between any foreign country and any State, Territory, or District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

29 USC Section 152(7).

The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

29 USC Section 160(a).

The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in Section 158 of this title) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: *Provided,* That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this subchapter or has received a construction inconsistent therewith.

29 USC Section 156

The Board shall have authority from time to time to make, amend, and rescind, in the manner prescribed by sections 1001-1011 of Title 5, such rules and regulations as may be necessary to carry out the provisions of this Act.

NLRB ANNOUNCEMENT OF NEW JURISDICTIONAL POLICY, JULY 1, 1954.

The National Labor Relations Board today announced seven changes in its standards for determining whether the Board will take jurisdiction of a case. The earlier standards were adopted in October 1950.

The Board has discretion to decide in which cases, of those affecting interstate commerce, it will exercise jurisdiction.

The changes are:

A. The Board increased the amount of direct outflow of interstate business required to bring a company under its jurisdiction, from $25,000 a year to $50,000 a year.

B. The Board increased the amount of goods or services that must be supplied to interstate companies to bring the supplier under the Board's jurisdiction, from $50,000 a year to $100,000 a year.

C. The Board established a requirement that the goods supplied by firms under paragraph B above ultimately go outside the state or the services supplied be part of the stream of interstate commerce. (There was no such requirement in the former standards.)

(Trucking Companies)

D. The Board established a requirement that intra-state trucking companies and similar firms which are "links in interstate commerce" do at least $100,000 a year business for other interstate firms in order to come under Board jurisdiction. (The former standards did not contain any dollar criterion in this category.)

E. Jurisdiction will not be exercised over general or public office buildings merely because they have tenants over which the Board exercises jurisdiction.

F. A franchise from a national enterprise will not be sufficient in and of itself to bring a company under the Board's jurisdiction.

G. The Board abolished the "combination category": Jurisdiction will not be determined by combining the per-

centages which a company has in each of the dollar-volume categories.

(Effective Date)

The Board announced that these changes in its jurisdictional standards will take effect immediately. The new standards will be applied to pending cases as well as those filed hereafter.

The changes indicated were made by majority vote in specific cases; the Board was not unanimous. Dissents will be included in the decisions as they issue.

The various standards which the Board thus far follows in asserting jurisdiction within the 48 states, after today's amendments, are as follows (Other aspects of the Board's 1950 plan for asserting jurisdiction are under study with a view to possible revision of policy in the future):

1. Instrumentalities and channels of commerce, interstate or foreign, except that: Jurisdiction will be exercised over intrastate trucking companies and similar firms which are links in interstate commerce if they do at least $100,000 worth of business annually for other concerns in categories 1, 2, or 4.

2. Public utilities and transit systems.

(Multi-State Enterprises)

3. Establishments operating as an integral part of a multi-state enterprise, except that: Jurisdiction will not be exercised over an establishment solely because it is operating under a franchise from a national enterprise. Jurisdiction will be exercised over franchised establishments only if they satisfy some other standard in the plan.

4. Enterprises producing or handling goods destined for out-of-state shipment or performing services outside the state in which the firm is located, where such goods or services are valued at $50,000 a year. (Formerly $25,000 a year.)

5. Enterprises furnishing goods or services of $100,000 a year or more (formerly $50,000) to concerns in categories 1, 2, or 4, except that:

(a) Jurisdiction will not be exercised over enterprises supplying materials or furnishing services to other firms which do interstate business unless the materials themselves ultimately go outside the state or unless the services are part of the stream of commerce.

(b) Jurisdiction will not be exercised over general or public office buildings merely because such buildings have tenants over which the Board takes jurisdiction.

6. Enterprises with a direct inflow of goods or materials from out of State valued at $50,000 a year.

7. Enterprises with an indirect inflow of goods or materials valued at $1,000,000 a year.

8. Establishments substantially affecting the national defense.

(The former category eight, which was eliminated by today's action, provided for taking jurisdiction over: 'Enterprises having such a combination of inflow or outflow of goods or services, coming within categories 4, 5, 6, or 7, that the percentages of each of these categories, in which there is activity, taken together add up to 100.)

(Emphasis added).

APPENDIX B

UNITED STATES OF AMERCA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

THE DIXIE TERMINAL COMPANY
and
BUILDING SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 158-A, BUILDING SERVICE EMPLOYEES INTERNATIONAL UNION, AFL

Case No. 9-CA-497

ORDER DENYING MOTION

On February 18, 1953, the Board issued a Decision and Order[1] in the above-entitled proceeding. Thereafter, on July 12, 1954, counsel for the Respondent filed a motion to withdraw and rescind the aforesaid Decision and Order, and on July 28, 1954, filed a motion for oral argument. The Board having duly considered the matter,

IT IS HEREBY ORDERED that the said motion to withdraw and rescind be, and it hereby is, denied, and

IT IS FURTHER ORDERED that the motion for oral argument be, and it hereby is, denied.

Dated, Washington, D. C., August 13, 1954.

By direction of the Board:

FRANK M. KLEILER,
Executive Secretary.

[1] 102 NLRB 1452.

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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 540

THE DIXIE TERMINAL COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (R. III, 21-22) [1] denying the petition for an order vacating its prior judgment is not officially reported. The original

[1] The symbols "R. I." and "R. II" refer respectively to the Board and Company appendices filed with this Court in an earlier stage of this proceeding (No. 770, October Term, 1953). The symbol "R. III" refers to the Supplementary Transcript of Record filed herein. "Pet., App." refers to the Appendix attached to the Petition.

opinion of the court below (R. II, 142a-146a) pursuant to which the prior judgment was entered is reported at 210 F. 2d 538. This Court's denial of petitioner's application for a writ of certiorari to review that judgment is reported at 347 U. S. 1015.

JURISDICTION

The initial judgment of the court below (R. II, 142a), enforcing with modifications not here relevant, an order of the National Labor Relations Board (R. I, 8a; 102 NLRB 1452) was entered on February 26, 1954. An application for a writ of certiorari to review that judgment was denied on June 7, 1954. Thereafter, on September 24, 1954, petitioner herein (respondent below) filed a Petition for Order Vacating Judgment And Denying Enforcement (R. III, 6) which was denied by the court below on October 21, 1954. The petition herein for a writ of certiorari was filed on January 13, 1955. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1), and under Section 10(e) of the National Labor Relations Act, as amended.

QUESTION PRESENTED

Whether a decree enforcing a Board order in an unfair labor practice proceeding against a business enterprise should be vacated merely because the Board subsequently adopts a self-imposed limitation on the exercise of its jurisdiction which would preclude its future assertion of jurisdiction over similar business enterprises so long as the self-imposed limitation remained in effect.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., 151, *et seq.*), are set forth at pp. 16-17 of the Petition.

STATEMENT

On February 26, 1954, the court below, pursuant to a petition for enforcement, entered its judgment enforcing a Board order which, so far as relevant here, required petitioner to reinstate a discharged employee with back pay, to post notices, and to cease and desist from engaging in the unfair labor practices found. 210 F. 2d 538. In the opinion accompanying the judgment, the court below rejected petitioner's contention that because its operation consisted merely in running an office building, the Board was without jurisdiction.

On May 19, 1954, petitioner applied in this Court for a writ of certiorari (No. 770, October Term, 1953), advancing as its sole contention that the Board lacked jurisdiction over petitioner's enterprise because it was essentially a "local business." On June 7, 1954, this Court denied certiorari. 347 U. S. 1015.

Thereafter, on July 1, 1954, the Board publicly announced a new jurisdictional policy, applicable to pending [2] and future cases, in which it enumer-

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[2] In *Wemyss, d/b/a Coca Cola Bottling Co.*, 110 NLRB No. 134, 35 LRRM 1131, issued November 10, 1954, the Board defined pending cases to include those in which a Decision and Order had not yet issued. In the instant case, not only had the Decision and Order issued prior to the announcement of its new jurisdictional policy but a decree of enforcement had already been entered by the court below.

ated several "changes in its standards for determining whether the Board will take jurisdiction of a case" (Pet., App. 18). One of the changes so announced provided that "Jurisdiction will not be exercised over general or public office buildings merely because they have tenants over which the Board exercises jurisdiction" (*ibid.*).[3] On July 9, 1954, petitioner, relying on this announcement, filed with the Board a motion to withdraw and rescind the Board order which had been enforced by the court below (R. III, 17). The Board denied this motion on August 13, 1954 (Pet., App. 21).

Thereupon petitioner, on September 24, 1954, filed in the court below a petition for an order vacating judgment and denying enforcement (R. III, 6). The court below, on October 21, 1954, entered an order denying this petition on the ground that an application for writ of certiorari having been denied, its prior judgment with respect to jurisdiction and liability of the petitioner had become final, and that the Board's later determination not to exercise jurisdiction in certain cases was not sufficient

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[3] This change, like the others, was subsequently implemented by a series of formal Board decisions beginning with *Breeding Transfer Company*, 110 NLRB No. 64, 35 LRRM 1020. Thus, in *McKinney Avenue Realty Company*, 110 NLRB No. 69, 35 LRRM 1053, issued October 26, 1954, the Board ruled that "in future cases the Board will assert jurisdiction over an office building operation only when the employer which owns or leases and which operates the office building is itself otherwise engaged in interstate commerce and also utilizes the building primarily to house its own offices."

ground to vacate the judgment (R. III, 21). The instant petition seeks review of this order.

ARGUMENT

Petitioner contends (Pet. 5-15) that the Board's self-imposed limitation respecting the future exercise of its statutory jurisdiction requires invalidation of a judgment which had become final before the limitation was announced. We submit that the contention is without merit and presents no question warranting certiorari.

1. The propriety of the Board's initial assertion of jurisdiction in this case is, of course, no longer open to question,[4] and "The fact that by a self-denying rule or order made since this complaint was filed and order entered, the Board has set limits to the exercise in the future of the jurisdiction which it possesses is not a matter of which [the petitioner] may avail." *National Labor Relations Board* v. *Red Rock Co.*, 187 F. 2d 76, 78 (C. A. 5), certiorari denied, 341 U. S. 950. Accord: *National Labor Relations Board* v. *Concrete Haulers, Inc.*, 215 F. 2d 959 (C. A. 5). *A fortiori,*

[4] While the Board's public announcement of its new jurisdictional policy and its holding in the *McKinney* case (*supra*, p. 4, n. 3) limit the Board's future exercise of jurisdiction over "general or public office buildings" so long as that policy remains in effect, note the observation of the court below (210 F. 2d, at 540) that petitioner's operation is not a "typical metropolitan office building" but is used in part "by the inter-urban bus line and the telegraph company in their actual physical interstate operations instead of the usual operations incident to leased office space."

this is true here where not only was a complaint filed and order entered, but enforcement was obtained and a petition for certiorari denied, all before the new jurisdictional rule or order was made. This Court recently denied a petition for writ of certiorari in *Thomas Rigging Company* v. *National Labor Relations Board,* 348 U. S. 871, rehearing denied, January 31, 1955, which was predicated in part on the very ground here urged, and even more recently in *Brooks* v. *National Labor Relations Board,* 348 U. S. 96, affirmed the enforcement of a Board bargaining order notwithstanding a notation in this Court's opinion that the case, if now brought, would fall outside the Board's "new jurisdictional yardsticks" (p. 104, n. 16).

2. Contrary to petitioner's assertion (Pet. 5-7), there is no conflict between the decision here and that of the Eighth Circuit in *National Labor Relations Board* v. *National Gas Co.,* 215 F. 2d 160. There the court held, for reasons that are not entirely clear, that a Board order directed to an enterprise over which the Board would not assert jurisdiction under its current policy was not entitled to enforcement. The court apparently gave decisive weight to the circumstance that the Board had subsequently in *Brooks Wood Products,* 107 NLRB No. 71, 33 LRRM 1104, "expressly overruled" the *National Gas* case because the latter decision was an "unwarranted extension" of its then controlling jurisdictional policy. This appears to be a ruling that the Board had erred in the first in-

stance in the application of the then existing standards. No such circumstance exists in the instant case. As has been noted, in the instant case a judgment enforcing the Board order had already issued in which the propriety of the Board's assertion of jurisdiction was specifically confirmed, and a petition for writ of certiorari on that very issue had been denied. Moreover, the *National Gas* decision, to the extent that it can be construed as a holding that a prior valid assertion of jurisdiction is necessarily invalidated by a later self-denying rule or order, would appear to be out of harmony with the action of this Court in the *Brooks* case, *supra.*

3. Petitioner's claim (Pet. 12-15) that to leave the judgment below in effect is to subject it to an arbitrary and capricious regulation from which similar enterprises are free is devoid of merit. To the extent that this claim encompasses a charge that the Board erroneously asserted jurisdiction in the first instance, petitioner has had its day in court. And the right of the Board thereafter, in the exercise of its discretionary authority (*National Labor Relations Board* v. *Denver Bldg. Council,* 341 U. S. 675, 684), to withhold the assertion of its jurisdiction is well settled. So long as "the Board acts within its statutory and constitutional power it is not for the courts to say when that power should be exercised." *National Labor Relations Board* v. *Townsend,* 185 F. 2d 378, 383 (C. A. 9), certiorari denied, 341 U. S. 909.[5]

[5] Accord: *Haleston Drug Stores, Inc.* v. *National Labor Relations Board,* 187 F. 2d 418, 421 (C.A. 9), certiorari denied, 342 U.S. 815; *National Labor Relations Board* v. *Gulf Public*

Indeed, petitioner does not challenge the propriety of the Board's determination that while the newly announced standards remained in effect,[6] it would not assert jurisdiction over office buildings which did not meet the criteria prescribed therein. It argues merely that because details of reinstatement and back pay due under the decree remain to be determined, the instant case is still "pending" within the meaning of the Board's rule so as to invoke the new jurisdictional standards. But the Board, of course, has "the right to construe its own rules" (*National Labor Relations Board* v. *J. S. Popper, Inc.*, 113 F. 2d 602, 603-604 (C.A. 3)), and its construction, reasonable on its face, is that the term "pending cases" should include only those cases in which the Board has not already taken the final step in its administrative process, namely, the issuance of a Decision and Order.

Service Co., 116 F. 2d 852, 854-855 (C.A. 5); *National Labor Relations Board* v. *Mid-Co Gasoline Co.*, 183 F. 2d 451, 453 (C.A. 5); *International Brotherhood of Electrical Workers* v. *National Labor Relations Board*, 181 F. 2d 34, 36 (C.A. 2), affirmed, 341 U.S. 694.

[6] As the Board noted in its *Wemyss* decision, *supra*, p. 3, n. 2, just as changes in overall circumstances warranted a departure from the valid 1950 jurisdictional standards theretofore in effect, "further changes in circumstances may again require future alterations of our own determinations one way or another." Accordingly, the Board declared that it would not invalidate jurisdictional determinations in which a Decision and Order had already issued applying the valid standards theretofore existing but would limit the application of the new standards "to all future and to all pending complaint cases which have not yet resulted in the issuance of a Decision and Order . . . ."

Here, not only had the Decision and Order been entered, but the judgment enforcing that order had become final both "with respect to jurisdiction and liability" (R. III, 21). That further action might be required to fix the precise limits of that liability does not impair the finality of the judgment. Cf. *McComb* v. *Jacksonville Paper Co.*, 336 U. S. 187; *Parker* v. *United States*, 129 F. 2d 374, 380 (C. A. 1).

CONCLUSION

The decision of the court below is plainly correct and presents neither a conflict of decisions nor any question warranting review. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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FEBRUARY, 1955.

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